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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 204

WILLIAM HENRY HACKETT,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner prays that this Honorable Court will rehear the Petition for Writ of Certiorari filed in the above entitled cause and docketed on June 25th, 1952.

ORDER

On the 9th day of October, 1962, this Honorable Court entered an Order denying the Petition for Writ of Certiorari filed in the above-entitled cause to review the judgment of the United States Court of Appeals for the Sixth Circuit. Justice White and Justice Goldberg did not consider the Petition.

QUESTIONS PRESENTED

1. Did the Trial Judge err in refusing to grant the Petitioner an opportunity to renew his Motion to Suppress the Evidence at the trial?

2. Was the denial of a preliminary examination a deprivation of the rights granted the Petitioner under the Federal Rules of Criminal Procedure, such as to deny the Petitioner due process of law?

SUPPLEMENTARY STATEMENT OF FACTS

The Petitioner was charged with violation of the Federal Narcotics Laws, specifically 21 U.S.C. 174 and 26 U.S.C. 4705(a) in an Indictment rendered on November 2, 1960. At the time of Petitioner's arrest narcotics were seized from a camera bag which he allegedly had in his possession. The Petitioner, by his Attorney, moved to suppress the evidence as a result of an illegal search and seizure, which Motion was denied on the basis that the Federal Agents were acting upon information received from a reliable Informer. During the course of the trial, the Informer denied under oath that he had given the information to the Federal Agents. At this time the Petitioner sought to renew his Motion and the Trial Judge refused to permit him to renew the Motion on the grounds that it could not be raised again during the trial.

When the Petitioner was arraigned, the date for a preliminary examination was set. The Petitioner and his Attorney appeared in Court on the date set for the preliminary examination before the Honorable Judge Feikens, District Judge for the Eastern District of Michigan. At that time,

the United States Attorney requested an adjournment of the preliminary examination because certain witnesses were unavailable. Petitioner objected to an adjournment stating that he was prepared for the examination at that time and desired to proceed. District Judge Feikens indicated on the record that he felt that Petitioner was entitled to a preliminary examination and the Government Attorney stated that he would be prepared for an examination in one week. District Judge Feikens then adjourned the examination for one week with a stipulation that it would be held at that time. During the interim, the United States Attorney obtained an Indictment against the Petitioner and he was denied any preliminary examination or other opportunity to determine the nature of the case which the Government had prepared against him. Petitioner then made a Motion to Quash the Indictment and remand the case for preliminary examination on the grounds that the adjournment was fraudulently obtained. At the hearing on the examination, the Government Attorney testified under oath that at the time he requested the continuance he had in fact no intention of permitting the Petitioner a preliminary examination. District Judge Freeman, who heard the Motion, denied it and ordered the case set for trial.

REASONS FOR GRANTING A REHEARING

1. The facts and circumstances surrounding the Petitioner's arrest and the search of his person and the automobile, which were set forth in the Petitioner's Petition for a Writ of Certiorari previously filed in the above-entitled matter, indicate that the search was illegal. The Court's refusal to permit the Petitioner to renew his Motion at the time the unreliability of the Informer was as-

serted, denied the Petitioner due process of law. In *DiBella v. United States*, 369 U. S. 121 (1962), decided subsequent to the trial in the above-entitled matter, this Court decided that a Motion to Suppress Evidence must be renewed at the trial and is not appealable prior to trial. Therefore, the law upon which the Trial Judge relied in denying the Petitioner the right to renew his Motion was erroneous in the light of the *DiBella* case and the admission of the illegally seized evidence was a denial of due process of law. At the time the Motion was made prior to trial, the basis for denying it was the reliability of the Informer from whom the Government Agents obtained the information leading to the Petitioner's arrest. At the time of trial, the unreliability of the Informer became apparent from his own statements on the witness stand, but the merits of the Motion were restricted to the testimony available prior to the trial. Therefore, although the search was illegal and the evidence should have been suppressed, the refusal of the Trial Judge to permit the Motion to be renewed at the time of trial, permitted the Government to introduce evidence which had been seized in violation of the Petitioner's Constitutional rights.

2. The action of the United States Attorney in obtaining a continuance of the preliminary examination for the sole purpose of depriving Petitioner of his right to such examination was unwarranted by the Federal Rules of Criminal Procedure and resulted in the deprivation of the rights guaranteed to the Petitioner by Rule 5 of the Federal Rules of Criminal Procedure. Bad faith of the United States Attorney in obtaining such a continuance was clearly illustrated by the testimony at the hearing on the Motion to Quash the Indictment. Under oath the United States Attorney stated that his witnesses were not available because "We had no intention of holding the pre-

liminary examination on October 27th". (Appellant's Appendix, page 27a.)

The language of Rule 5 of the Federal Rules of Criminal Procedure granting the Petitioner a right to a preliminary examination is mandatory, not permissive. It states that if the Defendant does not waive the right to a preliminary examination, he *shall* have a right to have the evidence heard within a reasonable time. Being apprised of Judge Feikens' statements that the Judge felt the Defendant was entitled to know the nature of the Prosecutor's case, the Government Attorney resorted to fraudulent statements of his true intent in order to obtain time, ostensibly for the purpose of obtaining certain witnesses, but actually for the purpose of obtaining an Indictment and thereby denying the Defendant his right to a preliminary examination. When a District Attorney is permitted to resort to subterfuge and misrepresentation to win a case, and may freely admit that he had no intention to do what he represented he would do, then no longer may citizens be secure in the thought that their basic freedoms are protected by the Constitutional guarantee of fairness, embodied in the Bill of Rights. If a Prosecutor feels himself frustrated in his goal to convict the accused, he may then use any manner of subterfuge, limited only by his audacity and his imagination to circumvent the Constitutional obstacles set up to protect the accused.

In the instant case, the Prosecutor asked to be sworn and under oath he testified not only that he had no intent to go forward with the preliminary examination, but also that the practice in which he was engaging was the common procedure in that office. (Appellant's Appendix 27a, 28a.)

The fact that it is the common practice of the Department does not justify it; in fact, it only illustrates more clearly how corroded the processes of judicial administration at the prosecution level have become. This Court in the exercise of its supervisory jurisdiction of Lower Federal Courts and the Department of Justice should review this type of practice since it is the common practice of the Prosecutor's office and take this opportunity to define the limits within which a preliminary examination may be denied to an accused, after he has requested it.

CONCLUSION

For the foregoing reasons and the reasons contained in the Petition for a Writ of Certiorari, heretofore filed, it is respectfully prayed that this Honorable Court will rehear and reconsider its decision in the above-entitled cause.

Respectfully submitted,

GOLDFARB and HUDNUT,
ALBERT A. GOLDFARB,
Attorneys for Petitioner,
2001 Cadillac Tower,
Detroit 26, Michigan.

Dated this 31st day of October, 1962,
Detroit, Michigan.

CERTIFICATE OF COUNSEL

Albert A. Goldfarb, being first duly sworn, deposes and says that:

He is a duly licensed attorney in the State of Michigan and has been admitted to practice before the Bar of the Supreme Court of the United States.

That he has been retained by the Petitioner to prepare this Appeal in his behalf.

That he has prepared the attached Petition and knows the contents thereof.

That the attached Petition for Rehearing has been submitted because he believes it is based upon meritorious grounds and not interposed for the purpose of delay.

That the attached Petition for Rehearing raises new matter not considered in the prior Petition for Certiorari and is related to such new matter.

Albert A. Goldfarb,
Attorney for Petitioner,
2001 Cadillac Tower,
Detroit 26, Michigan.

Dated this 31st day of October, 1962,
Detroit, Michigan.

Subscribed and sworn to before me this 31st day of October, A. D. 1962.

Elizabeth M. Fox,
Notary Public, Wayne County, Michigan.
My commission expires August 24, 1964.